

APPENDIX A
[Opinion and Judgment Below]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE FRANK ROBEL,

Defendant.

MEMORANDUM
OPINION
AND ORDER

The United States procured the indictment of Eugene Frank Robel in May, 1963 for an alleged violation of Section 5(a)(1)(D) of the Subversive Activities Control Act, 50 U.S.C. § 784(a)(1)(D). The indictment contains but one count which charges:

"COUNT I

"1. That there is and has been in effect since October 20, 1961 a final order of the Subversive Activities Control Board requiring the Communist Party of the United States of America to register with the Attorney General of the United States as a 'Communist-action organization,' as defined in Title 50, United States Code, Section 782.

"2. That on or about August 20, 1962, the Secretary of Defense, pursuant to the provisions of Title 50, United States Code, Section 784(b), designated the Todd Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility, and thereafter notices of such designation were posted, and continue to be so posted, by the corporation in conspicuous places about the plant.

"3. That from on or about November 19, 1962 and continuously up to and including the date of this indictment, in the Northern Division of the West-

ern District of Washington and within the jurisdiction of the Court, Eugene Frank Robel did unlawfully and willfully engage in employment in a defense facility, to wit, Todd Shipyards Corporation, Seattle Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice of the said final order requiring the Communist Party to register with the Attorney General as a Communist-action organization and with knowledge and notice that the said Todd Shipyards Corporation, Seattle Division had been and continues to be designated a defense facility by the Secretary of Defense, in violation of Title 50, United States Code, Section 784(a)(1)(D)."

The subsection of the statute reads as follows:

"When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful —

"(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final —

* * *

"(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility."

Defendant promptly moved to dismiss the indictment on the ground that it fails to charge an offense for the reason that the statute upon which it is based is violative of Article I, Section 9, and of the First, Fifth and Sixth Amendments to the Constitution of the United States, and for the additional reason that the indictment fails to set forth and state certain essential elements of the offense charged.

Briefs supporting and opposing the motion were filed and oral argument had. Decision on the motion has been delayed, awaiting final decision in the cases of *Aptheker v. Secretary of State* (1964) 378 U.S. 500, and *United States v. Brown* (1965) 381 U.S. 437, involving similar issues.

Supplemental argument in letter form was submitted following the decision in said cases.

For the purpose of this motion, certain pertinent facts alleged in the proceedings may be assumed as true. They are that Robel, a native-born citizen of the United States, approximately fifty-four years of age, has been employed as a shipyard worker at the Todd Shipyards for a period in excess of ten years. During that time he has been and still is a member of the Communist Party. On August 20, 1962, the Secretary of Defense designated Todd Shipyards as a "defense facility," within the meaning of the Act. Notices to that effect were posted conspicuously in the plant area. Ninety days later, on November 19, 1962, Robel's continued acts of employment, which remained unchanged and which apparently had been lawful up until this time, then became criminal.

As can be seen from the indictment, no charge is made against Robel that he is an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party. No charge is made that he intends to promote strikes or engage in activities inimical to the security of the United States. The government argues that it does not have to prove these elements. All it has to prove, under the statute, are the following four facts:

- (1) An order of the Attorney General requiring the Communist Party of America to register as a Communist-Action group;
- (2) Designation of Todd Shipyards as a defense facility by the Secretary of Defense;
- (3) Knowledge on the part of Robel that the shipyard had been designated as a defense facility and knowledge that the Attorney General had ordered the Party to register; and
- (4) Membership of Robel in the Communist Party.

From the confluence of these four factors alone criminal guilt (supposedly) flows. In other words, it is argued that the defendant is criminally liable regardless of whether he is an active or passive member of the Party, regardless of whether he believes and subscribes to a few, most, or all of the Party's aims, and regardless of whether he personally has any intent to act adversely to the government's interests.

Throughout its brief the government contends that membership in the Communist Party is not, without more, a crime. Nevertheless, the defendant here subjects himself to the full penalties of the statute unless he either relinquishes his employment with the shipyard or resigns from the Party. Giving up his employment, we may assume, would mean a severe hardship, possibly involving the loss of valuable seniority rights. Thus, the only financially acceptable choice is resignation from the Party, although he has the lawful right to be a member. But the government contends he does not have a right to continue working at the shipyard and remain a member of the Communist Party - this is a crime. It is a crime not because of anything Robel has done but because the large group of which he is a member has been administratively adjudicated to have certain unlawful purposes. If all of Robel's activities remain unchanged - except that he gives up his Party membership - then there is no guilt; no crime is committed. Still, the government contends that being a Communist is not criminal. Whatever the precise element that Party membership contributes to criminality it is undeniably the central fact upon which guilt will depend in this case. And when criminal guilt is dependent upon a person's association with a large class of people, questions of First Amendment freedoms and due process under the Fifth Amendment hover in the background, and the indictment must be strictly construed.

An examination of *Scales v. United States* (1961) 367 U.S. 203 and *Noto v. United States* (1961) 367 U.S. 290 in connection with the recent cases of *Aptheker v. Secretary*

of State (1964) 378 U.S. 500, and *Brown v. United States*, ^{supra} (1965) 381 U.S. 437 convinces me that the indictment does not charge an offense against the United States.

The government contends without reservation that the indictment need not allege nor prove the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes. It is true that the statute does not explicitly so provide or require. This omission may ultimately serve to render subsection 5 of the Act here under consideration (50 U.S.C. § 784(a)) unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State*, ^{supra}, at page 511, footnote 9. Certainly if this likely constitutional infirmity is to be overcome the requirements of active membership and specific intent must be deemed implicitly in the statute. *Scales v. United States*, 367 U.S. 203, ^{supra}, page 220 and footnote 11, page 221.

The indictment does not charge specifically or by inference either of the essential elements of active and knowing membership nor specific intent and the government does not so contend.

The nexus of guilt between a group and one of its members must depend on links more numerous and more substantial than those charged by the government. ^{supra}

It is therefore ORDERED that the indictment be and is hereby DISMISSED.

DATED October 4, 1965.

WILLIAM J. LINDBERG
United States District Judge

APPENDIX B

[Statute Involved]

The Subversive Activities Control Act, 64 Stat. 987, 50 U.S.C. 781 ff., as amended, provides in part as follows:

DEFINITIONS

Sec. 3 [50 U.S.C. 782]. For the purposes of this title—

* * *

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

* * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any fa-

cility designated and proclaimed by the Secretary of Defense pursuant to section 5 (b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * *

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

Sec. 5 [50 U.S.C. 784]. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST ORGANIZATIONS

Sec. 6 [50 U.S.C. 785]. (a) When a Communist organization as defined in paragraph (5) of section 3 of this

title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

* * *

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

Sec. 10 [50 U.S.C. 789]. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization, or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or other-

wise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name or the organization appearing in lieu of the blank: "Disseminated by _____, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by _____, a Communist organization".

* * *

PENALTIES

Sec. 15 [50 U.S.C. 794]. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register; to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than \$10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

* * *

(c) * * * Any individual who violates any provision of sections 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.